U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: February 10, 2000

Case No.: **1998 INA 215**

In the Matter of:

PHYLLIS R. MINTZ, Employer,

on behalf of

IWONA ZYCH, Alien

Appearance: A. J. Olshevski, Esq., of New York, New York, for Employer and Alien
Certifying Officer: Dolores DeHaan, Region II.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that PHYLLIS R. MINTZ ("Employer"), filed on behalf of IWONA ZYCH ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States

[1] The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On July 11, 1996, the Employer filed for alien labor certification on behalf of the Alien to fill the position of "Cook, Household." The job duties were described as follows:

> Plan menus, purchase food, prepare, cook, bake meals, including Kosher & Polish cuisine, for working couple, business/social guests as suitable for occasion & according to recipes and considering taste and dietary requirements. Clean kitchen. Wash & iron table linens. Set & decorate table; decorate platters & baskets.

AF 13. The position offered was classified as "Cook (Household)(live out)" under DOT Occupational Code No. 305.281-010. [2] The wage offered was $12.81 per hour for a forty hour week, with hours from 8:00 A.M. to 4:00 P.M., and no overtime. The education required was completion of high school and two years of experience in the Job Offered. The Other Special Requirements were (1) no smoking on premises and (2) knowledge of Kosher and Polish recipes. *Id*., Items 13, 14, 15.[3]

Notice of Findings. The CO's July 23, 1996, Notice of Findings ("NOF") found that the Employer failed to establish (1) that the position offered was full time employment within the meaning of 20 CFR § 656.50,[4] (2) that the job requirements were not unduly restrictive under 20 CFR §§ 656.21(b)(2), and (3) that the hourly wage rate offered equalled or exceeded the prevailing wage under 20 CFR § 656.20(C)(2). (1) The CO reviewed the job duties for this household and said, "It does not appear feasible that these duties constitute full time employment in the context of your household." The NOF then discussed the evidence Employer was required

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[2] 305.281-010 **COOK** (domestic ser.) Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.)*GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 6 DLU: 81.*

[3] The Alien, a national of Poland, was born in 1963 and completed high school in 1982. She was living in Brooklyn in an H-4 visa at the time of application. She worked as household cook in Poland from 1982 to 1984, where her job duties were the same as the duties listed in box 13 of Form ETA 750 A. She was not employed from 1990 to the date of application.

[4] This regulation was recodified as 20 CFR § 656.3.

to proffer to sustain the burden of proof. (2) The CO explained that the Employer requirement of two years' experience in cooking Kosher and Polish recipes was not a normal job requirement for the position of Cook Domestic, adding, "The employer may instruct the cook to prepare any number of types of food. However, the requirement that is determined to be unduly restrictive is that the applicant have specialized experience in preparing Kosher and Polish food." The CO then said that to rebut this finding the Employer may delete the ethnic/religious cooking requirements or show that it arises from business necessity and is essential to performing this job in a reasonable manner. (3) The NOF said that under 20 CFR § 656.40(a)(1) Employer's wage offer of $12.81 per hour was below the prevailing wage rate of $17.43 per hour. Employer was given the rebuttal option of increasing the hourly rate offered or submitting countervailing evidence that the prevailing wage determination was in error.

Rebuttal. On February 16, 1998, the Employer filed a Rebuttal to address the issues of the NOF. The Employer presented evidence and argument in response to the NOF direction to prove that the position offered was full time employment under the regulations.

In response to the NOF direction that she establish that the job requirements were not unduly restrictive under 20 CFR § 656.21(b)(2) the Employer cited her negotiations with the state employment security agency. Employer initially discussed the broad variety of ethnic and religious cooking specialties encompassed by DOT No. 313.361-030 [5] She argued that,

> Although the occupation of a Cook, Specialty, Foreign Food falls into a category of hotel and restaurant workers, the close reading of the job descriptions of a Cook, Domestic, and Cook, Specialty, Foreign Food, leads to an unquestionable conclusion that both occupations employ the same or very much similar scope of duties. The only difference is the setting where the duties are to be performed. If a patron a restaurant is entitled to foods and meals of his/her own liking or in accordance with his/her own religious beliefs, why should a private person be deprived of the same privilege?

AF 53. As evidence in support of her argument the Employer presented pages excerpted from other applications for certification in the New York region to prove that relief had been granted to similarly situated applicants asserting the same hiring criteria.

She then argued that the hourly wage rate she offered equalled or exceeded the prevailing wage under 20 CFR § 656.20(C)(2). Contending that she offered $12.81 per hour in reliance on the apparent recommendation of the state employment security agency, the Employer asserted that the wage rate she had advertised complied with those instructions and should be found in

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[5] **313.361-030** COOK, SPECIALTY, FOREIGN FOOD (hotel & rest.) Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.). GOE: 05.10.08 STRENGTH: M GED: R3 M3 L2 SVP: 7 DLU: 77

compliance with the prevailing wage regulations. Employer then alluded to the circumstance that the prevailing wage determination was increased after that time and prior to referral to the CO, the Employer said, "[M]erely because the prevailing wage changed in the period of time between the actual advertising and the processing of the application by the Region is preposterous." The Employer concluded that she was "not willing to readvertise because of the alleged discrepancy between the October ’96 and January ’98 prevailing rates of pay." AF 54. (Emphasis as in quoted text.)

Final Determination. After considering Employer’s rebuttal documentation with the remainder of the record, the CO denied certification by the Final Determination issued on April 9, 1998. AF 57-59. The CO first concluded that the Employer had established that the position constituted permanent full time work under the Act and regulations.

Summarizing the NOF directions as to the job requirements, the CO said (1) Employer had not demonstrated that an applicant with two years of cooking experience could not readily adapt to a Kosher and Polish style of cooking; (2) Employer did not show that an applicant with no prior experience in Kosher and Polish cooking is incapable of preparing Kosher and Polish food; and (3) Employer failed to explain why she or a member of her household could not provide training or instruction in the Kosher and Polish cooking traditions, as the NOF directed. Reiterating the observations of the NOF, the CO again pointed out that the Employer could have the cook prepare food of any type, but the hiring criteria that required job candidates to have specialized experience in preparing Kosher and Polish style food were unduly restrictive. As the Employer did not delete this restrictive requirement and as she failed to prove its business necessity, the CO denied certification.

Appeal. The Employer appealed to BALCA on May 13, 1998, contending that the CO’s denial of relief was "based entirely on speculative presumptions, flagrant misconstruction of facts, disregard for the prospective employer’s compelling need for a household cook and the presented evidence."

Employer argued that the DOT job description under No 305.281-010 says, *inter alia*, "[M]ay prepare fancy dishes ...; may prepare food for special diets." (Emphasis as in quoted text.) Employer argued that "ethnic/religious foods do fall under the category of ’special diets.’" The Employer declared that she was not unwilling to provide training to applicants, but argued, "It is the employer’s understanding that since the SVP for this particular occupation is 6, the employer is entitled to look for a fully qualified worker who does not need any additional training." Moreover, the Employer said such training would be costly and lengthy, due at least in part to the element of religion and tradition such training would involve.

Discussion

Burden of proof. The Employer’s failure to comply with the requirements for the production of evidence required by the NOF is pronounced in this case. First, she failed to proffer the evidence of the existence of a full time position required at AF 34-36, an omission that would have supported denial of certification if pursued by the CO in the Final

Determination. Second, under 20 CFR § 656.21(b)(2), she did not offer proof of the business necessity of her unduly restrictive requirement that the job applicants have specialized experience in preparing Kosher and Polish food, having failed to delete this requirement.

The Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application pursuant to the Act and regulations.[6] The imposition of the burden of proof is based on the fact that labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification.[7]

Unduly restrictive hiring criteria. While it may adopt any qualifications it may fancy for the workers it hires in its business, an employer must comply with the Act and regulations when it seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the employer's hiring criteria conflict with the explicit prohibition of 20 CFR 656.21(b)(2)(i), a regulation adopted to implement the relief granted by the Act, which provides that the job offer shall not include unduly restrictive hiring criteria in the recruiting process.

As the purpose of 20 CFR § 656.21(b)(2) is to make the job opportunity available to qualified U. S. workers, unduly restrictive requirements are prohibited because they have a chilling effect on the number of U. S. workers who may apply for or qualify for the job opportunity. **Venture International Associates, Ltd**, 87 INA 569(Jan. 13, 1989)(*en banc*). Where the employer cannot document that the job requirement is normal for the occupation or that it is included in the Dictionary of Occupational Titles or where the job requirement is for a language other than English or involves a combination of duties or requires the worker to live on the premises, 20 CFR § 656.21(b)(2) requires the employer to establish the business necessity

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[6] Moreover, the Panel is required to construe this exception strictly, and to resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

[7] "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

for that job requirement.[8]

Job duties. In applying the DOT job descriptions to this case it is more realistic to reexamine the application and to compare it with the work described in DOT Nos. 305.281-010 and 313.361-030. First, the Employer's application expressly stated that she wishes to hire a Household Cook, and not a cook for a restaurant or hotel. This objective was confirmed by the hourly rate Employer has offered to attract candidates from the Nation's labor force. Second, the job duties are to be performed for a working couple and for their business/social guests on the occasions when the Employer needs a cook. Although the NOF directed that the rebuttal must include evidence as to level of such social activity as would indicate her actual need for a full-time cook in this household, no such proof was offered by the Employer. AF 36, with which compare AF 52-56. The person to be hired would also clean the kitchen, wash and iron the table linens, set and decorate the dinner table, and decorate platters and baskets in addition to planning menus, purchasing food, cooking and baking meals that included Kosher and Polish cuisine. AF 13.

This work pattern was compared with DOT No. 305.281-010, COOK (domestic ser.), who also plans menus and cooks meals in a private home according to recipes or tastes of employer. The detailed itemization of the individual skills required to carry out these duties as specified by the DOT entry is as comprehensive as it is exhaustive:

> Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries.[9]

The CO reasonably suggested that a person with the skills that could qualify for the job under DOT No. 305.281-010 could be instructed to prepare foods according to such ethnic and religious recipes as the Employer found desirable. The Employer rejected this notion, however.

The duties of the position Employer wishes to fill are different from the DOT job description of a Foreign Food Specialty Cook. First, DOT No. 313.361-030 describes a hotel and restaurant worker, rather than a household employee. The number of meals prepared and persons served is exponentially different. By the Employer's failure to present the evidence required by the NOF that she had an actual need for a cook or more than the two people who

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[8] The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the restrictive requirement bears a reasonable relationship to the occupation in the context of its business and (2) that the use of the restrictive requirement is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. While the Employer offered little or no evidence of "business necessity," the holding in **Information Industries** provides guidance in the application of such evidence as does appear in this record.

[9] If the Household Cook specializes in preparing and serving dinner for employed, retired or other persons this person would be designated a Family-Dinner Service Specialist (domestic ser.

would be served daily, the Panel cannot find that she proved that more than two meals would be served by the Household Cook, regardless of Employer's *pro forma* assertion to the contrary. The commercial cook described by this DOT entry also plans menus, prepares, seasons, and cooks meats, soups, sauces, vegetables, and other items according to recipes and prescribed methods and recipes within the designated Foreign Food specialty. In describing the normal hiring conditions for a worker with these skills, the DOT said such a worker is,

> Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.).

The position at issue clearly is not in a hotel or a restaurant. The distinguishing characteristic of the work of a Foreign Food Specialty Cook in the DOT is the worker's concentration on a limited range of ethnic recipes and the high volume of his work in those recipes. This is inconsistent with the job description presented by the application, which anticipated a work volume was so low that the NOF required added proof to support a finding that the Employer was offering full time forty hour a week employment within the meaning of 20 CFR § 656.3. The Panel agrees with the reasoning of the CO that a Household Cook is not the same as a Hotel and Restaurant Cook, and DOT No. 313.361-030 is not a subspecialty encompassed by DOT No. 305.281-010, based on the job descriptions in the DOT and on the facts established by the Employer in this case.

Specific Vocational Preparation. The issues found in the NOF and definitively concluded in the Final Determination were whether the Employer's requirement of two years of specialized experience in Kosher and Polish cooking were unduly restrictive. This argument turns on the significance of Employer's contention that the SVP level should be sufficient to provide the specialized training it seeks as a rehiring qualification.[10]
In Appendix C the DOT defined the Specific Vocational Preparation as the amount of elapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. "This training," Appendix C continued, "may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and

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[10] Because the CO abandoned the findings as to prevailing wage as a reason for denial of certification, in spite of the Employer's refusal to comply with 20 CFR § 656.20(C)(2), the Panel will not consider this defect in determining whether or not to affirm the denial of certification.

essential experience in other jobs."[11]

The Employer contended that somehow during the two years of experience and training under either Level 6 for a Cook (domestic ser) under DOT No. 305.281-010 or during the four years of experience and training under Level 7 for a Cook, Specialty, Foreign Food (hotel & rest) under DOT No. 313.361-030 the applicant must also have acquired skills in Kosher and Polish cooking. As Employer assumed that the applicants would learn such expertise in addition to the cooking techniques required to meet the DOT job description, it is inferred that a further period of training in the preparation of the designated Foreign Food is contemplated in either of these occupational categories. This immediately leads to the inference that, regardless of which category is chosen, the requirement for special training in the added ethnic cooking skills will require a period of time that exceeds the level fixed by the Appendix C and its business necessity must be proven under the regulation. As no evidence of business necessity appears of record, the CO correctly concluded that the Employer failed to sustain the burden of proving her entitlement to certification.

Moreover, the Panel takes note of the implications of the Employer's appellate argument regarding the length of training necessary to acquire the skills she believed to be needed for the preparation of Kosher meals:

> Additional fact which should be taken into account while reviewing the employer's unwillingness to offer training is the religious factor. The Kosher cuisine is not merely another type of foods and meals: It comes from thousands of years of tradition and strong religious background and beliefs and requires certain type of knowledge not only as to how foods should be prepared but also why and where those requirements come from. Given those factors, providing training in this case would be both lengthy and costly.

AF 61. If the capacity to prepare foods that meet the standard of Levitical purity Employer asserted in her appellate argument was accepted as the hiring criterion, it would be reasonable to contemplate a period of specific vocational preparation through years of religious study that would reach Levels 8 and 9 of Appendix C, since an awareness of "not only as to how foods should be prepared but also why and where those requirements come from" logically implies training in the Talmudic laws relating to Kashruth and their historic and social background. As

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[11]The following are the various levels of specific vocational preparation that the DOT fixed at Appendix C:

Level	Preparation
1	Short demonstration only.
2	Anything beyond short demonstration up to an including 1 month.
3	Over 1 month up to and including 3 months.
4	Over 3 months up to and including 6 months.
5	Over 6 months up to and including 1 year.
6	Over 1 year up to and including 2 years.
7	Over 2 years up to and including 4 years.
8	Over 4 years up to and including 10 years.
9	Over 10 years.

this assumption is clearly inconsistent with the job duties described in the application, the argument is without merit and is rejected.

Summary. As discussed above, the NOF provided sufficient notice of the reasons for the denial of certification, and told the Employer how to cure the defects found in the application. Employer's rebuttal failed to sustain the burden of proof. As we are persuaded that the job was correctly classified for the reasons stated above, moreover, it is concluded that the Employer's hiring criteria were an unduly restrictive within the meaning of 20 CFR 656.21(b)(2)(i). Since the evidence of record supports the CO's denial of labor certification under the Act and regulations, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.